



COMMONWEALTH of VIRGINIA

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The Honorable Bill Janis
Member, House of Delegates
Post Office Box 3703
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Dear Delegate Janis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether credit card agreements governed by the laws of Virginia are written contracts for statute of limitations purposes under § 8.01-246, even though the terms of the contract are found in a series of documents, at least one of which is signed by the cardholder.

Response

It is my opinion that the statute of limitations for written contracts applies to credit card agreements in the situation where the agreement consists of a series of documents, provided that at least one of the documents referencing and incorporating the others is signed by the cardholder, and also provided that the written documents evidencing the agreement contain all essential terms of the agreement.

Background

You relate that lower courts of at least one jurisdiction have held, during the course of credit card debt collections, that credit card agreements are unwritten contracts for purposes of Virginia's statutes of limitations.¹ You state that such rulings were made in spite of the following un rebutted evidence:²

- (1) The cardholder applies for, receives, and uses a credit card, and in so doing, signs (either physically or electronically³) an application requesting the credit card, the back of the card, and/or charge slips documenting transactions made with the card;
- (2) After a card issuer receives, reviews, and approves an application, it opens an account and sends the customer an unactivated credit card, and a written customer agreement;

¹ You state that these courts are foreign courts applying Virginia choice-of-law provisions.

² For purposes of this advisory opinion, I assume all of the statements to be true.

³ The Uniform Electronic Transactions Act permits the use of electronic signatures in electronic transactions in Virginia. See VA, CODE ANN. §§ 59.1-480, 59.1-483 and 59.1-485 (2006).

- (3) The customer agreement, along with other account documents or writings incorporated by reference into it (e.g., the credit card, the cardholder's signed application, and periodic billing statements reflecting transactions made on the credit card account),⁴ contain all of the essential terms of a credit card agreement;
- (4) The back of the credit card contains language near the required signature line stating that use of the card constitutes agreement to be bound by the written customer agreement; and
- (5) The cardholder does, in fact, use the credit card and thereafter receives periodic billing statements showing the cardholder's transaction activity and payments and the terms governing repayment of any outstanding debt.

Applicable Law and Discussion

Section 8.01-246 provides, in relevant part:

[A]ctions founded upon a contract, other than actions on a judgment or decree, shall be brought within the following number of years next after the cause of action shall have accrued:

* * *

2. In actions on any contract which is not otherwise specified and which is in writing and signed by the party to be charged thereby, or by his agent, within five years whether such writing be under seal or not;

* * *

4. In actions upon any unwritten contract, express or implied, within three years.

The rationale for a longer statute of limitations for written contracts than for unwritten contracts has been explained as follows:

When a contract is written, it is the language of the contract itself which governs, and the effect of lost evidence, faded memories, and missing witnesses is less prejudicial to the adjudication of the claim than where parol evidence, memories, and witness will be relied upon to determine the actual terms of an oral contract.^[5]

The Supreme Court of Virginia has held that for an agreement to be deemed a written contract for statute of limitation purposes, it must "show on its face a complete and concluded agreement between the parties. Nothing must be left open for future negotiation and agreement . . ."⁶ Consequently, if a written

⁴ You further state that the federal Truth-in-Lending Act requires periodic billing statements for credit cards to include terms such as the interest rates applicable to each billing period, the outstanding balance for each billing period, the minimum payment due for each billing period, and the due date for each payment. 12 C.F.R. § 226.7 (2011). When credit card accounts are opened, credit card issuers are required to disclose to credit card holders a number of terms, including, but not limited to, the annual percentage interest rate charged on the account and how it will be calculated. 12 C.F.R. § 226.6 (2011).

⁵ Marley Mouldings, Inc. v. Suyat, 970 F. Supp. 496, 499 (W.D. Va. 1997).

⁶ Newport News, Hampton & Old Point Dev. Co. v. Newport News St. Ry. Co. 97 Va. 19,21,32 S.B. 789, 790 (1899). See also Digital Support Corp. v. Avery, 49 Va. Cir. 324, 326 (Fairfax Cnty. 1999) ("In order to constitute a

agreement is missing one or more essential terms, it is an unwritten contract for statute of limitations purposes, and is subject to a three-year limitations period.⁷

Virginia law does not require that a written contract be contained within a single writing to satisfy § 8.01-246(2). Virginia courts routinely enforce contracts that comprise multiple writings created at different times,⁸ and § 8.01-246 contains no requirement of a single writing for the five year limitations period to apply. Rather, it provides only that such an agreement be “in writing and signed by the party to be charged.”⁹ I presume the “legislature chose, with care, the words it used when it enacted the relevant statute, and [courts] are bound by those words as [courts] interpret the statute.”¹⁰ At the time of its passage, the General Assembly had the opportunity to insert a single written document requirement, but chose not to do so.

In addition, in a case concerning a matter analogous to your credit card scenario, the United States Bankruptcy Court for the Eastern District of Virginia considered whether to apply the five-year limitations period to a line of credit agreement, the terms of which were found across several different documents and business records.¹¹ There was no single written line of credit agreement entered into between the parties; instead the agreement was evidenced by signed loan request forms, ledger accounts maintained by the lender, and spreadsheet summaries of the accounts maintained by the lender.¹² In applying the five-year statute of limitations period to the line of credit agreement, the Court stated:

[E]ach loan request form issued by [the borrower] ... states a sum specific and is signed by the companies' chief financial officer ... or an employee under his control. [The lender] recorded all intercompany transfers as receivables in the due from [the borrower] account, and the majority of these cash transfers were designated as loans... Finally these loans were recorded on a spreadsheet that showed interest was applied in a consistent manner. The present writings found in the business records of [the lender] and [the borrower] evidence a complete and concluded agreement that leaves nothing open for future negotiation.^[13]

written contract, the ‘essential terms of the agreement must be obvious on the face of the writing without recourse to parol evidence.’”) (quoting *Janus v. Sproul*, 250 Va. 90, 91, 458 S.E.2d 300,301 (1995)).

⁷ *Id.* at 22, 32 S.E.2d at 790 (written agreement to donate a sum of money expressly left to future agreement of the parties the conditions upon which the donation was to be made). *See also Marley Mouldings, Inc.*, 970 F.Supp. at 499-500 (deeming a contract unwritten for statute of limitations purposes because it left open essential terms such as subject matter, consideration to be paid for services and the duration of the services).

⁸ *See, e.g., J.M. Turner & Co. v. Delaney*, 211 Va. 168, 171-72, 176 S.E.2d 422, 425 (1970) (considering two separate letters, agreed to at different times, to be one contract); *Pro-Football, Inc. v. Paul*, 39 Va. App. 1, 8-10, 569 S.E.2d 66, 70 (2002) (finding that a professional football player’s contract of employment included not only the original contract, but also a third-party trade agreement and satisfaction of conditions precedent); *Farenth v. Windson Dev. Corp.*, 21 Va. Cir. 216,217-18 (Fairfax Cnty. 1990) (construing together as one contract separate agreements for the purchase of real property and for the purchase of extras pertaining to the property).

⁹ VA. CODE ANN. § 8.01-246(2) (2007).

¹⁰ *City of Va. Beach v. ESG Enters, Inc.*, 243 Va. 149, 153,413 S.E.2d 642, 644 (1992) (quoting *Barr v. Town & Country Props.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

¹¹ *Cohen v. UN-Ltd. Holdings, Inc. (In re NELCO, Ltd.)* 264 B.R. 790 (Bankr. E.D. Va. 1999).

¹² *Id.* at 796.

¹³ *Id.* at 803

Therefore, I conclude that § 8.01-246(2) does not require a written contract to be reduced to a single writing to qualify for the five-year limitations period. Under the facts you present, the requirements of § 8.01-246(2) are satisfied. First, a valid contract is formed between the consumer and the credit card company when the cardholder accepts the credit card company's offer of credit by performing on the contract (e.g., by using the credit card).¹⁴ Also, the signature requirement is met by the consumer's electronic or physical signature on the credit card application, on purchase transaction slips and on the back of a credit card containing reference to the credit card agreement. Finally, together the writings, which are connected by internal references to each other and the credit card agreement, provide all of the essential terms (e.g., interest rate, repayment terms, payment due dates) of the parties' agreement. Thus, because there is written evidence of a complete agreement between the parties,¹⁵ there is no concern that "lost evidence, faded memories or missing witnesses" will prejudice the claim.¹⁶

Conclusion

Accordingly, it is my opinion that the statute of limitations for written contracts applies to credit card agreements in the situation where the agreement consists of a series of documents, provided that at least one of the documents referencing and incorporating the others is signed by the cardholder, and also provided that the written documents evidencing the agreement contain all essential terms of the agreement.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

¹⁴ See *Sharp Elecs. Corp. v. Deutsche Fin. Servs. Corp.*, 216 F.3d 388, 394 (4th Cir. 2000); *Bank of Va. v. Lentz*, 8 Va. Cir. 407, 408 (Richmond City 1987). See also *Whitman v. Capital One Bank (USA), N.A.*, 2009 U.S. Dist. LEXIS 108203 6-7 (Md. 2009) ("Courts have consistently held that '[t]he use of [credit] cards amounts to the acceptance of the terms of the cardholder agreements.'") (quoting *Fahey v. O.S. Bank Nat'l Assoc.*, 2006 U.S. Dist. LEXIS 70956 (E.D. Mo. 2006) and citing cases).

¹⁵ If, however, a court were to hold that one or more essential contractual terms were missing from the writings, or that parol evidence was required to fully establish a missing term, it would conclude that the requirements of § 8.01-246(2) were not met, and apply the three-year statute of limitations for unwritten contracts. See *supra* note 7 and accompanying text. Courts in other jurisdictions have followed this approach in credit card cases. See, e.g., *Portfolio Acquisitions, LLC v. Feltman*, 909 N.E.2d 876, 884 (Ill. 2009) (parol evidence needed to establish all essential terms and conditions of agreement and the relationship between the parties); *Colo. Nat'l Bank of Denver v. Story*, 862 P.2d 1120, 1122 (Mont. 1993) (signed credit card application and billing statements, in and of themselves, do not establish written contract); *Jenkins v. Gen. Collection Co.*, 538 F. Supp.2d 1165, 1173-74 (D. Neb. 2008) (credit card company failed to produce receipts signed by cardholder).

¹⁶ See *supra* note 5 and accompanying text.